

## Talking points for New York State Wetlands Forum Annual Conference

### Topic: Clean Water Act 404(g) rulemaking effort

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Date:

- I want to turn to another EPA rulemaking effort: Section 404(g) of the Clean Water Act (CWA).
- Under Clean Water Act Section 404, a permit is required before dredged or fill material can be discharged into “waters of the United States,” including certain wetlands.
- Section 404(g) of the CWA provide states and tribes the option of assuming, or taking over, the permitting responsibility and administration of the Section 404 permit program for certain waters.
  - EPA is supportive of all state and tribal efforts to take on management of their aquatic resources and supports efforts to assume permitting responsibilities such as Section 404(g).
  - An EPA approved state or tribal dredged or fill program must at all times be consistent with and no less stringent than the CWA requirements.
  - To date, only Michigan and New Jersey have assumed administration of the Section 404 program – the Army Corps of Engineers retains permitting authority for the rest of the country.
- EPA is supportive of all state and tribal efforts to take on a greater role in managing their aquatic resources and supports efforts such as assuming authority for CWA Section 404(g). To facilitate assumption, EPA has initiated several actions:
  - In the 2018 Spring Regulatory Agenda, the EPA announced it is undertaking a rulemaking to modernize the CWA Section 404 state/tribal assumption process. This rulemaking is an important first step to providing states and tribes with the clarity they need in order to assume CWA Section 404 permitting authority
  - On September 20, 2018, Acting Administrator Wheeler, sent a message to all state Governors and all Tribal leaders regarding EPA’s support for Assumption as well as our intent to seek their input on regulatory revisions to this program.
- Through this rulemaking EPA:
  - Is seeking to clarify assumption requirements, improve the usability of the regulations, and foster a greater long-term effectiveness by the states and authorized tribes in assuming the program.
  - Will respond to recommendations provided by the National Advisory Council for Environmental Policy and Technology in 2017.
  - Will seek input from states and tribes on areas of the regulations that could benefit from further clarity.
    - In November and December of 2018, EPA hosted early input sessions with the states and tribes. 32 states and 58 tribes participated in these sessions.
    - Engagement with states, tribes and other stakeholders will continue throughout the rulemaking process.
- Proposed rule anticipated in early 2020 and final in early 2021. Currently EPA staff are working through the early input recommendations and crafting options to be considered in a proposed rule.

### Q & A

- Are any states or tribes currently interested in assuming the program?

- EPA is actively working with several states such as FL, OR, AZ, and MN as they pursue assumption of the program.
  - Others have indicated interest but are awaiting finalization of these regulatory revisions.
- What funding is available to administer such a program?
  - States and tribes can apply for wetland program development grants to develop and pursue assumption of the program.
  - States and tribes can use their 106 monies to fund this CWA program.
  - States and tribes can charge fees for permit issuance.
  - States and tribes could fund these programs through other state or tribal mechanisms.
- Why is EPA undertaking this rule at this time?
  - These regulations were last updated in 1988, they need modernization! Additionally, states and tribes requested that we clarify which waters are assumable under the CWA section 404(g) program as the uncertainty around this question has been identified by states as a barrier to assumption.
- How does this relate to the rulemaking efforts to define waters of the US?
  - Waters of the US defines which waters are jurisdictional under the Clean Water Act.
  - This rulemaking will clarify who the permitting authority is for which waters of the US, the Corps or the state or tribe. This rulemaking will not define the jurisdictional scope of waters subject to the CWA requirements.
- When a state assumes the 404 program who retains permitting authority on tribal lands?
  - When a state assumes permitting authority for discharges of dredged or fill material, the Corps retains permitting authority on tribal lands. The reverse is also true if a tribe assumes CWA 404 permitting authority but a state does not – in this case the Corps retains permitting authority over all non-tribal waters.